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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JUAN CARLOS AQUINO, Defendant and Appellant.	B206926 (Los Angeles County Super. Ct. No. BA317136)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed as modified.

David D. Martin, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

Juan Carlos Aquino pleaded no contest to two counts of second degree robbery and admitted related firearm-use enhancements. As part of the negotiated plea agreement, seven other robbery counts and related firearm-use enhancements were dismissed. On appeal Aquino argues the trial court committed reversible error when it denied his request to represent himself made on the day of trial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Aquino was arrested and charged by information on March 19, 2007 with nine counts of second degree robbery (Pen. Code, § 211)[1] involving victims in three separate incidents. Aquino, represented by the public defender's office, pleaded not guilty.

On April 16, 2007 the People filed an amended information adding special firearm-use allegations under section 12022.5, subdivision (a), to each robbery count.[2] Aquino again pleaded not guilty and denied the special allegations.

After several continuances of the pretrial conference, on July 12, 2007 the People made a plea offer of 10 years in state prison. Aquino requested time to consider the offer. The trial, then set for July 19, 2007, was continued to August 21, 2007. On that date Aquino, still represented by counsel, rejected the People's offer. The People filed a second amended information, modifying the basis for the firearm-use allegations to section 12022.53, subdivision (b), as to each robbery count. Jury trial was continued to August 28, 2007.

On August 27, 2007 Aquino, through his counsel, made a motion under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) to discharge his appointed counsel. After a closed hearing, the motion was denied. Jury trial remained set for the following day, August 28, 2007.

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[1] Statutory references are to the Penal Code.

[2] As to one count, the amended information also alleged Aquino had personally used a deadly weapon (a knife) to commit the robbery. (§ 12022, subd. (b)(1).)

On August 28, 2007 the trial was continued to September 12, 2007, apparently to allow Aquino time to retain private counsel. Aquino was still represented by the public defender's office on September 12, 2007 when the trial was continued to October 16, 2007. At some point the People had made another plea offer, this time for 12 years in state prison. The offer was withdrawn on October 16, 2007.

On October 17, 2007 the parties announced they were ready, and the matter was transferred to a new department for trial. Before jury selection began, counsel discussed with the court time estimates, witnesses and issues that might require an evidentiary hearing outside the jury's presence. Responding to the trial court's inquiry, Aquino's counsel recited the history of plea negotiations to date, including the 12-year offer, and counsel's assessment of the risk Aquino faced if he proceeded to trial.

The following exchange then occurred directly between Aquino and the court:

"THE COURT: It is your decision entirely. I am not pushing you. You need to understand there is a fair amount of risk involved here, should you be found guilty. . . .

"THE DEFENDANT [Aquino]: Yeah, I understand that, your Honor. Um, the thing is that in the last court they wouldn't allow me to fire him because he wasn't trying to help me. I've been trying to tell the judge. They won't grant it. That is why I want to exercise my *Faretta* rights.

"THE COURT: On the day of trial I find that untimely. I am going to deny that. Normally speaking had you gone that way earlier in this case, possibly, but on the day of trial --

"THE DEFENDANT [Aquino]: They didn't allow me.

"THE COURT: I am only dealing with what I have right here. You are here for trial just as the jurors are sitting outside in the hallway, I find that untimely. I know there is appellate authority for that. I am not abusing my discretion. I am going to deny your request to represent yourself.

"THE DEFENDANT [Aquino]: He never explained that, just kept on postponing it.

"THE COURT: I am only dealing with the case, first time we both met; right?

"THE DEFENDANT [Aquino]: Right.

"THE COURT: You come here, this is what I have to deal with. We are ready to go to trial. I want to hear from you, absolutely, your Honor, I understand the risk. Let's go to trial, exercise my trial rights. I will do everything in my power to give you a fair trial, or you want a moment to chat with your lawyer? It's up to you, sir. I am not forcing you to do anything. I just want to make sure whatever decision you make, you make cognizant of the risk you are facing. That is all I am telling you. You want to chat with [defense counsel]?

"THE DEFENDANT [Aquino]: I don't understand. I still don't understand. I don't want to continue with him. I don't want him to represent me in that case. I will represent myself. I was never able to get police reports. There is no general trust between me and him.

"THE COURT: Let me say for the moment two things, number one, if you are asking to represent yourself [in] pro per, I am denying that on timeliness grounds. I believe that -- we are not on the eve of trial. This is trial. I believe I can fairly deny you that right on timeliness grounds. Number two, do I hear a *Marsden* motion here?

"DEFENSE COUNSEL: Sounds like it."

The trial court then heard and denied the *Marsden* motion in a closed hearing. When proceedings resumed, the People indicated the plea offer of 12 years in state prison was still open. After conferring with counsel, Aquino agreed to accept the offer. Aquino pleaded no contest to second degree robbery as charged in counts 1 and 2 and admitted the section 12022.53, subdivision (b), firearm-use allegation as to each count.

On November 20, 2007 Aquino appeared with counsel for sentencing. Prior to the imposition of sentence, Aquino advised the court he wanted to withdraw his plea. His counsel declined to join in the motion, and Aquino invoked his right to represent himself under *Faretta v. California* (1975) 422 U.S. 806 [95 S.Ct. 2525, 45 L.Ed.2d 562]

(*Faretta*). The court granted Aquino's *Faretta* request. Hearings on the motion and possible sentencing were set for January 2, 2008.

On January 2, 2008 Aquino appeared in propria persona. The trial court heard and denied his motion to withdraw his plea, which was based on his counsel's purported failure to advise him of possible defenses to the charges or of the immigration consequences of his plea. Aquino was sentenced, in accordance with the plea agreement, to an aggregate state prison term of 12 years, consisting of concurrent terms of two years (the low term) on counts 1 and 2 for second degree robbery, plus 10 years for the accompanying firearm-use enhancements.[3] The remaining counts and special allegations were dismissed on the People's motion.

Aquino timely appealed and obtained a certificate of probable cause.

DISCUSSION

It is now a fundamental precept of our criminal justice system that every defendant, rich or poor, has the right to assistance of counsel and that no accused may be convicted and imprisoned unless he or she has been accorded that right. (See, e.g., *Gideon v. Wainwright* (1963) 372 U.S. 335, 344 [83 S.Ct. 792, 9 L.Ed.2d 799] ["in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him"]; *Powell v. Alabama* (1932) 287 U.S. 45 [53 S.Ct. 55, 77 L.Ed. 158]; *Johnson v. Zerbst* (1938) 304 U.S. 458, 462-463 [58 S.Ct. 1019, 82 L.Ed. 1461].)

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[3] As the People note, during the plea hearing the firearm enhancements were sometimes identified as having been alleged under section 12022.5, subdivision (b), which relates to use of a machinegun or assault weapon when committing a felony and other times under section 12022.53, subdivision (b). Aquino expressly admitted the firearm enhancements as alleged under section 12022.53, subdivision (b); and the 10-year enhancement imposed is consistent with both that admission and the plea agreement. However, at sentencing the trial court again referred to the enhancements as alleged under section 12022.5, an error that is also reflected in the clerk's minute order and abstract of judgment. We order the minute order and abstract of judgment corrected to reflect the firearm enhancements that Aquino in fact admitted.

Yet a criminal defendant also has the right under the Sixth and Fourteenth Amendments to waive the right to counsel and to represent himself or herself. (*Faretta, supra*, 422 U.S. at p. 819 ["[t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense"].) "'A defendant in a criminal case possesses two constitutional rights with respect to representation that are mutually exclusive. A defendant has the right to be represented by counsel at all critical stages of a criminal prosecution. [Citations.] At the same time, . . . because the Sixth Amendment grants to the accused personally the right to present a defense, a defendant possesses the right to represent himself or herself.'" (*People v. Koontz* (2002) 27 Cal.4th 1041, 1069.)

If the defendant is mentally competent and, within a reasonable time before trial, makes an unequivocal request knowingly and voluntarily after having been advised by the court of the dangers of self-representation, the request must be granted. (*Faretta, supra*, 422 U.S. at p. 835; *People v. Valdez* (2004) 32 Cal.4th 73, 97-98; *People v. Welch* (1999) 20 Cal.4th 701, 729.) "'No particular form of words is required in admonishing a defendant who seeks to waive counsel and elect self-representation.' [Citation.] Rather, 'the test is whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case.'" (*People v. Blair* (2005) 36 Cal.4th 686, 708.)

A defendant's right to self-representation, however, is absolute only if he or she invokes that constitutional right a reasonable time prior to the start of trial. (*People v. Windham* (1977) 19 Cal.3d 121, 127-128 (*Windham*) ["in order to invoke the constitutionally mandated unconditional right of self-representation a defendant in a criminal trial should make an unequivocal assertion of that right within a reasonable time prior to the commencement of trial"].) If a defendant asserts the right to self-representation on the eve of trial or after trial has commenced, the trial court has discretion to deny the request. (*Id.* at pp. 127-128 ["once a defendant has chosen to proceed to trial represented by counsel, demands by such defendant that he be permitted to discharge his attorney and assume the defense himself shall be addressed to the sound

discretion of the court"]; *People v. Frierson* (1991) 53 Cal.3d 730, 742 [motion for self-representation made on the eve of trial is untimely and is thus addressed to sound discretion of the trial court]; *People v. Clark* (1992) 3 Cal.4th 41, 99-100 [trial court had discretion to deny motion for self-representation because it was made when the trial date was being continued on a day-to-day basis, in effect on the eve of trial]; see *People v. Wilkins* (1990) 225 Cal.App.3d 299, 303 [request to proceed in propria person made on the eve of trial is untimely]; *People v. Rudd* (1998) 63 Cal.App.4th 620, 625-626 [motion made on the Friday before a trial scheduled to begin the following Monday was untimely].)

Given the importance of the right to self-representation, the trial court may not simply deny an untimely motion for self-representation. Rather, "trial courts confronted with nonconstitutionally based motions for self-representation [must] inquire *sua sponte* into the reasons behind the request" (*Windham, supra*, 19 Cal.3d at p. 129, fn. 6) and exercise their sound discretion after considering several factors, including "the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion." (*Id*. at p. 128; see *Wilkins*, *supra*, 225 Cal.App.3d at pp. 303-304 [grant or denial of request made on the eve of trial "is within the sound discretion of the trial court after it has inquired sua sponte into the specific factors underlying the request"]; see generally *People v. Burton* (1989) 48 Cal.3d 843, 852 [trial court's discretion to deny an untimely motion exists to "prevent the defendant from misusing the motion to unjustifiably delay trial or obstruct the orderly administration of justice"].)

The Supreme Court in *Windham*, however, "decline[d] to mandate a rule that a trial court must, in all cases, state the reasons underlying a decision to deny a motion for self-representation which is based on nonconstitutional grounds." (*Windham, supra*, 19 Cal.3d at p. 129, fn. 6.) The court's exercise of discretion in denying the untimely motion is properly affirmed if substantial evidence in the record otherwise supports the inference the court had those factors in mind when it ruled. (*People v. Scott* (2001) 91

Cal.App.4th 1197, 1206.) This is true even if the trial court failed not only to state the reasons for its decision to deny the motion but also to make the sua sponte inquiry generally required. Thus, in *People v. Dent* (2003) 30 Cal.4th 213, a motion for self-representation was denied without a *Windham* inquiry solely because it was a death penalty case, an improper reason. The Supreme Court stated, "Even though the trial court denied the request for an improper reason, if the record as a whole establishes defendant's request was nonetheless properly denied on other grounds, we would uphold the trial court's ruling." (*Dent*, at p. 218.) Ultimately the Supreme Court concluded the record in *Dent* did not otherwise support denial of the motion. Nevertheless, *Dent* sanctions appellate review of the entire record to determine whether the trial court abused its discretion in denying a motion for self-representation, even when the trial court based its denial of self-representation on an improper ground and without a *Windham* inquiry.

In this case the trial court made no *Windham* inquiry, apparently basing its decision to deny the untimely motion for self-representation solely on the grounds the motion was not made until the day of trial and was precipitated by Aquino's dissatisfaction with his current lawyer, who he had unsuccessfully attempted to replace with the *Marsden* motion. As in *Dent*, this record is simply insufficient for us to overlook the trial court's failure to make the required inquiry. We note, in particular, Aquino did not request a continuance of the trial; thus, no disruption or delay in the proceedings would have occurred as a result of granting the motion. To be sure, as the People argue, Aquino's statement in the wake of the court's ruling, "I was never able to get police reports," suggests Aquino did not believe he was ready for trial; and a delay may have reasonably been expected to follow the granting of his motion for self-representation. But that is pure speculation at this point—speculation that would be unnecessary had the court complied with the requirement imposed by *Windham*, *supra*, 19 Cal.3d 121 to inquire sua sponte as to the reasons for Aquino's request. Indeed, in the absence of any inquiry by the trial court or further explanation from Aquino, when the statement is considered in context, it is just as likely Aquino was simply stating the reason he felt "[t]here is no general trust between me and [my attorney]." At no time did

Aquino volunteer he was not ready for trial. Additionally, the record shows Aquino had not earlier asked to represent himself or demonstrated a proclivity to substitute counsel, having sought to have his appointed counsel relieved only once, again suggesting that granting the motion would not have been unduly disruptive.[4]

Although we are inclined to conclude that the trial court erred in failing to make the *Windham* inquiry and that denial of Aquino's motion for self-representation was improper, before we may grant relief—that is, before permitting Aquino to withdraw his no contest plea and proceed to trial—Aquino must demonstrate the improper denial of his motion did not constitute harmless error under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 for state law errors. (*People v. Rivers* (1993) 20 Cal.App.4th 1040, 1050 [although trial court erred in handling of untimely, nonconstitutional motion for self-representation, "this error is not automatically reversible, but is reviewed under the 'harmless error' test of *Watson*"]; *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1058 [same].)

From the perspective of a traditional *Watson* analysis—whether it is reasonably probable a result more favorable to the defendant would have been reached in the absence of the error—a defendant who represents himself or herself rarely, if ever, could achieve a better result than could be obtained by competent counsel. (See, e.g., *Faretta, supra,* 422 U.S. at p. 834 ["[i]t is undeniable that in most criminal prosecutions defendants could better defend with counsel's guidance than by their own unskilled efforts"]; *People v. Rivers, supra*, 20 Cal.App.4th at p. 1051 ["it is candidly recognized that a defendant who represents himself virtually never improves his situation or achieves a better result than

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[4] In *People v. Nicholson* (1994) 24 Cal.App.4th 584 the court canvassed the relevant case law and observed that discretionary denials upheld on appeal generally involved a defendant's request for continuance or proclivity to substitute counsel, neither of which is demonstrated in the record here. (*Id.* at p. 593.) The court further described two reported decisions, *People v. Herrera* (1980) 104 Cal.App.3d 167, 174-175, and *People v. Tyner* (1977) 76 Cal.App.3d 352, 355, in which the defendant had not requested a continuance; in each of those cases, the denial of the nonconstitutional motion for self-representation was reversed on appeal. (*Nicholson,* at p. 593.)

would trained counsel"].) Aquino presents nothing to demonstrate this general principle is not fully applicable in this case. Nor is the record here sufficient for us to conclude, if the motion for self-representation had been granted, Aquino would have declined the plea offer and elected to proceed to trial (whatever the outcome of that decision).

In a similar situation, where the validity of a guilty or no contest plea is challenged on the ground the defendant was denied his or her right to the effective assistance of counsel, to succeed "a defendant must establish not only incompetent performance by counsel, but also a reasonable probability that, but for counsel's incompetence, the defendant would not have pleaded guilty and would have insisted on proceeding to trial." (*In re Alvernaz* (1992) 2 Cal.4th 924, 934.) The Supreme Court has repeatedly held a defendant's self-serving statement he or she would not have accepted the plea offer but for the asserted error, standing alone, is insufficient to establish prejudice and "must be corroborated independently by objective evidence." (*Id.* at p. 938; accord, *In re Resendiz* (2001) 25 Cal.4th 230, 253.)

Here, Aquino was charged with nine counts of second degree robbery, each with a separate 10-year firearm-use enhancement under Penal Code section 12022.5, subdivision (b). By virtue of the plea agreement negotiated by his counsel and accepted by Aquino, seven of those nine counts were dismissed and the sentencing on the remaining two counts and related enhancements was to concurrent terms. There is no dispute the offer, as ultimately accepted, was accurately communicated to Aquino by his counsel, nor is there any question Aquino was amenable to negotiating a plea bargain. (See *In re Resendiz*, *supra*, 25 Cal.4th at p. 253 [identifying these factors as among those to be considered in determine whether defendant would have accepted or rejected a plea offer].) To the contrary, the *Marsden* hearing conducted immediately after the denial of the motion for self-representation makes it clear Aquino was simply hoping for a better deal. Indeed, when he filed his motion to withdraw his guilty plea, Aquino did not claim the plea was influenced by the trial court's denial of his motion for self-representation.

Under all these circumstances, any error in failing to make a *Windham* inquiry or in denying the motion was clearly harmless. (See *People v. Rivers*, *supra*, 20 Cal.App.4th at p. 1053.)

DISPOSITION

The judgment as reflected in the clerk's minute order is modified to state the 10-year firearm-use enhancements were imposed pursuant to Penal Code section 12022.53, subdivision (b). As modified, the judgment is affirmed. The superior court is directed to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

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PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.